SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. __

TOM DON FRANANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petioner Tom Don Franano respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *Tom Don Franano, Appellant,* v. *United States of America, Appellee,* No. 16,071, entered on April 27, 1960.

OPINIONS BELOW.

No opinion was filed by the Trial Court. The opinion of the Court of Appeals is reported in 277 F.2d 511, and is set out at pages 2A to 12A, inclusive of the Appendix attached hereto.

JURISDICTION.

The jurisdiction of this Court to entertain instant petition for certiorari is based upon Section 1254 (1), Title 28, United States Code.

The judgment of the Court of Appeals sought to be reviewed was entered on April 27, 1960 (a true copy of such Judgment of the Court of Appeals is set out at page 24A, hereinafter); petitioner's timely Petition for Rehearing was overruled by the Court of Appeals on June 3, 1960, and by Order dated June 30, 1960, Associate Justice Charles E. Whittaker, Supreme Court of the United States, extended the time for the filing of this petition until August 2, 1960. On July 8, 1960, the Court of Appeals entered an order extending the stay of mandate herein until August 13, 1960, with the provision that if on or before said date this petition is filed, upon receipt of a certificate from the Clerk of this Court relative thereto, the stay granted shall continue until the final disposition of this case by this Court.

QUESTIONS PRESENTED.

1. In a National Motor Vehicle Theft Act case involving one conspiracy and six substantive counts, where all of the substantive counts were included as overt acts

in the conspiracy count, should petitioner's conviction be allowed to stand where a Special Agent of the Federal Bureau of Investigation in attendance at the trial was allowed, over objection, to introduce six so-called summary exhibits going to each count of the indictment reflecting selective items from conflicting evidence introduced at the trial, information not in evidence at the trial, conclusions, hearsay information taken from FBI reports not in evidence and argumentative data invading the province of the jury?

2. In considering petitioner's contention that there was a fatal variance between allegations of the indictment in Counts II, IV and VII and the proof introduced relative to these counts, since the numbers on the automobiles involved were different, and petitioner's further contention the trial court erred in denying his motion for acquittal on Counts II, V, VI and VII for insufficiency of the evidence, did the Court of Appeals err in applying the theory that the jury, in finding appellant guilty on Count I, the conspiracy count, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged and that these overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII.

3. Should this Court as a matter of great public interest and importance in the administration of our criminal laws consider and rule on the growing practice in Federal Courts, as illustrated in this case, of charging defendants in the same indictment or information with violation of conspiracy and substantive statutes regarding the same alleged crimes for the obvious purpose of getting into evidence data not otherwise admissible and thereby creating the confusion and problems resulting therefrom?

STATUTES INVOLVED.

The statutes involved are set out verbatim on page 1A of the appendix hereto, and are as follows:

Section 371, Title 18, United States Code.
Section 2312, Title 18, United States Code.

STATEMENT.

Petitioner and three other persons, Frank Triola, Jr., Sam Triola and Jo Ann King, were charged with conspiring to violate the so-called Dyer Act, Section 2312, Title 18, United States Code, and with violating this same act in an indictment containing seven counts. The first count, the conspiracy count, set forth fourteen overt acts and, according to the opinion of the Court of Appeals, page 5, "These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII." Counts II through VII were substantive counts. It is here noted that the motor vehicles described in the various counts of the indictment, including the overt acts, were all Chevrolets. A copy of the indictment appears in the Appendix attached hereto beginning at page 13A.

At the trial, the Goverment called forty-nine witnesses and introduced seventy-two exhibits. Much evidence was introduced by the Government, under the theory it would be connected with the conspiracy, which had nothing whatsoever to do with any of the cars described in the indictment and was not, in fact, connected up. For example, Exhibits 44, 45 and 46, all pertain to vehicles in no way related to these charges (T. 227, 228, 229). One of these was relative to a 1957 Cadillac automobile.

At the close of the Government's case, the trial court sustained the motion of Sam Triola for judgment of acquittal (Tr. 408). Jo Ann King was found guilty on the conspiracy charge only and put on probation. Petitioner and Frank Triola, Jr., were found guilty on all seven counts and were each sentenced to custody of the Attorney General for a term of four years concurrently on each of Counts I, II and III and to a term of four years on each of Counts IV, V, VI and VII, these latter sentences to be served concurrently with each other, but consecutively to the terms on Counts I, II and III, making a total sentence of eight years (R. 104).

Petitioner then appealed to the Court of Appeals *in forma pauperis* and a fine young member of the bar, by court appointment, submitted typewritten briefs in his behalf seeking reversal on seven main grounds, including the following which are being urged in this petition: (a) The trial court erred in admitting exhibits 63 through 68; (b) petitioner's motion for judgment of acquittal on Counts II, IV and VII, should have been sustained on the grounds that there were fatal variances between the allegations of the indictment and the proof and (c) the trial court erred in overruling petitioner's motion for judgment of acquittal as to Counts II, V, VI and VII, on the grounds of insufficiency of the evidence.

Witness Frederick H. Alvey, Special Agent of the Federal Bureau of Investigation, identified exhibits 63 through 68 as charts which he prepared showing where the automobiles in issue were taken from and recovered and their serial numbers (T. 380). Copies of these exhibits are set out beginning on page 18A of the Appendix attached hereto. Agent Alvey testified that exhibit 63 related to Count II (T. 381) and that exhibits 64, 65, 66, 67 and 68, related to the automobiles allegedly in issue in the remaining

counts of the indictment. It will thus be noted that these exhibits went directly to each and every count of the indictment, including the conspiracy count, since each substantive count of the indictment was included as an overt act in the conspiracy count. Each of the exhibits were admitted over objections of counsel for petitioner on the grounds the exhibits did not constitute the best evidence, were hearsay and were argumentative in their cumulative effect (T. 382). The basis for said objections was in part the following testimony of Special Agent Alvey (T: 382):

> "Question: I note it says, 'Model, confidential serial number, the other number, car taken from, and car recovered, and title history.' Now, you compiled that as a result of the information you had learned from other witnesses, correct?
>
> Answer: That and my report. I checked it with my report as they went along and prepared it.
>
> Question: Your report as an agent?
>
> Answer: Yes, sir.
>
> Question: Which you file on all cases which you prepare and turn in on all cases which you investigate and file a report, an F.B.I. report?
>
> Answer: That's right.
>
> Question: So it is based upon the information you have received about the car mentioned in court, number two?
>
> Answer: That is correct."

Petitioner pointed out to the Court of Appeals that Agent Alvey had, in fact, selected and interpreted the data appearing on the said six charts and had resolved conflicting evidence introduced at the trial so it would conform to the trial theory advanced by the government. For example, on Exhibit 68, Mr. Alvey's conclusion as to the "Confidential" serial number on the automobile in issue, that is 57S309074, is a selective conclusion on his part since

there was conflict in the evidence as to the serial number on the vehicle involved in Count VII (T. 50, 83). Witness Pearson (R. 50) testified the number on this vehicle was 57S509074.

Further testimony of Witness Wilson J. Brady, Van Chevrolet Company (R. 218), was that the last check had of the automobile involved in Count III of the indictment was on July 29, 1957, but exhibit 64, prepared by Mr. Alvey, reflects the car was taken from Van Chevrolet Company "between August 6 and 14, 1957."

Witness F. S. Weller, Dumas-Milner Chevrolet Company, testified (T. 282) the automobile involved in Count IV, was reported missing on September 9, 1957, and that he would say it was on the lot a couple of days prior to that time. Exhibit 65 prepared by Mr. Alvey, however, states this car was taken from Dumas Milner Chevrolet Company between August 8 and 13, 1957. It is further noted Exhibit 65 reflects the car involved in Count IV was recovered on January 29, 1958, although this date does not appear in the testimony of either Mrs. Eunice K. Cormier or Special Agent Claude E. Gamble or any other witness at the trial.

Regarding the car allegedly involved in Count V, witness Wilson J. Brady, Van Chevrolet Company, testified it was visually checked as a floor plan car on September 14, 1957 (T. 220). Exhibit 66, however, relative to this automobile states it was taken from Van Chevrolet Company "between September 12, 1957, and October 15, 1957." There was simply no testimony or evidence offered at the trial supporting this conclusion.

Mr. Alvey further testified (T. 389) regarding his six charts:

"Question: It is true then, is it not, to say that all of the information contained in these Exhibits is based solely on information you have received from sources other than your own personal knowledge?

Answer: Yes, sir, I would say that is correct."

Exhibit 67, relative to the car allegedly stolen according to Count VI, reflects same was taken from St. Paul, Minnesota, "Between October 1, 1957, and October 31, 1957." It is noted there was simply no evidence introduced at the trial to support these data and that witness Newman Grossman, Minneapolis, Minnesota, owner of the company from which the car was taken testified (R. 307), it was shipped to his company on August 11, but no other date appears in the record to show when the car was allegedly taken or to substantiate the data reflected on the chart prepared by Agent Alvey. Exhibit 67 further reflects the car pertinent to Count VI, was recovered at Kansas City, Missouri, on November 26, 1957. Witness William Oscar McGrew, Kansas City, Missouri, who later purchased this automobile, testified (R. 300) it was bought by him on November 2, 1957, and that he had it for about two weeks before it was examined and kept by the Kansas City Police Department (R. 301). There is simply nothing in the trial record to substantiate the date November 26, 1957, used by Mr. Alvey.

In spite of the fact numerous discrepancies between the charts prepared by Agent Alvey and the evidence introduced at the trial, as outlined above, were presented to the Court of Appeals, and since Agent Alvey on re-direct examination and in response to a leading question testified that everything on the exhibits "was testified to here in Court during the three days of this trial" (R. 390), the Court of Appeals disposed of petitioner's contentions with the following statement on page 9 of its opinion:

"* * * The witness testified that there was nothing in the exhibits which had not already been introduced into evidence and we think the ruling was not prejudicial."

Regarding Counts II, IV and VII, petitioner pointed out to the Court of Appeals that testimony introduced at the trial (R. 95) showed that every 1957 Chevrolet produced had a different identifying serial number (R. 97); that this number was stamped on the motor block and also on a plate attached to the left-front door post (R. 97). Although there was much testimony to the effect number plates on the front doors of the automobiles involved were apparently changed, there was no testimony at the trial that anything was wrong with the numbers stamped on the motor blocks of any of the automobiles or that any effort to change these in any way was apparent.

Count II of the indictment in this case alleges theft of a 1957 Chevrolet automobile bearing serial number 57K-165361 but the proof introduced at the trial under this Count was regarding the theft of a vehicle bearing number VC57K165366 (R. 145). In Count IV the indictment alleges the transportation of a vehicle bearing number 57K165768, but the proof showed recovery, after the alleged transportation, of an automobile bearing number 57K165786 (R. 333). Count VII of the indictment alleges interstate transportion of a stolen automobile bearing true serial number 57S309074 and fictitious number VC57S301713. The proof at the trial showed recovery of a vehicle bearing true number 57S509074 (R. 50), and fictitious number VC-57S-320173 (R. 84). Absolutely no effort was made to identify any of these automobiles other than by general description and serial numbers, as by unusual equipment, marks or similar items.

In answer to petitioner's contention the above specific variances between the indictment counts and the proof was fatally prejudicial, the Court of Appeals merely stated on page 5 of its opinion:

> "* * * In the instant case there was positive proof of identity regardless of and without reference to the serial marks."

The opinion of the Court of Appeals did not state or indicate the nature of this "positive proof" and we cannot find it in the record of the trial.

With reference to petitioner's contentions there was no evidence to connect him with the offenses alleged in Counts II, V, VI and VII of the indictment, and that his motion for acquittal should have been sustained as to those Counts, as petitioner pointed out to the Court of Appeals, there is absolutely *no* evidence in the record connecting petitioner with the crime alleged in Count II. This point was not even contested by Government attorneys in the Court of Appeals. The only evidence connecting petitioner with Count V at the trial was that Mrs. Grantham notarized a title application at his request (R. 350) and that he was with Frank Triola, Jr., in Colorado at the time this automobile was sold by V. and G. Motors (R. 173, 174). The only evidence connecting petitioner with Count VI was the fact he was present when witness Riccardi was contacted by Triola regarding the selling of the car involved (Tr. 285). There was no evidence petitioner had anything to do with transporting this car interstate. Regarding Count VII, there was evidence petitioner talked to an automobile salesman in Colliersville, Tennessee, on an unknown date before the Christmas Holidays in 1957 (R. 24). The indictment charges the car in Count VII was taken on or about November 22, 1957. Although there was no contention petitioner had anything to do with the

sale of the car in this latter Count, a witness did contend he saw petitioner on the lot where this sale occurred earlier on the same day (R. 72).

The Court of Appeals in its opinion (pages 4 and 5), did not state there was evidence connecting petitioner with Counts II, V, VI and VII, but considered these allegations along with petitioner's contentions above indicated regarding variance between the allegations of the indictment and the proof relative to Counts II, IV and VII, as follows:

> "We shall consider appellant's contention that there is a fatal variance between the allegations of the indictment in Counts II, IV and VII and the proof, and his contention that the court erred in denying his motion for acquittal on Counts II, V, VI and VII, together.
>
> "In considering the question of the sufficiency of the evidence to sustain the judgment, we must view the evidence in a light most favorable to the Government and we must assume as proved every fact the evidence, direct or circumstantial, tends to prove, and the Government as the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proved.
>
> • • •
>
> "In this connection it should be borne in mind that the jury, in finding appellant guilty on Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII. Thus, overt act No. 1 charges that:
>
> "'On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr., transported a stolen 1957 Chev-

rolet from Kansas City, Missouri to Denver, Colorado.'

"This is the transportation described in Count II of the indictment. Overt act No. 2 likewise describes the transportation charged in Count III of the indictment; Overt act No. 4 charges the transportation charged in Count IV of the indictment; Overt act No. 7 charges the transportation charged in Count V of the indictment; Overt act No. 9 charged the transportation charged in Count VI of the indictment; Overt act No. 14 charged the transportation charged in Count VII of the indictment. Other overt acts charge various circumstances connected with the transportation of the automobiles described in the various Counts in the indictment, such as:

"'Overt Act No. 3. That on or about August 13, 1957, Tom Don Franano and Frank Triola, Jr., went to Pierre, South Dakota, where they obtained fraudulent titles for two stolen motor vehicles.

* * *

"'Overt Act No. 5. On or about August 30, 1957, Jo Ann King went to Russellville, Alabama and obtained two fictitious registrations for automobiles.

"'Overt Act 6. On or about September 12, 1957, Tom Don Franano and Frank Triola, Jr., went to Jefferson City, Missouri and obtained a fraudulent title for a stolen automobile.'

"There was proof that the car described in each Count of the indictment was stolen from the owner and that it was sold by appellant or one of his co-conspirators in another state and there was proof that the appellant, or one of his co-conspirators, fraudulently procured from various states evidence of title for each of the cars described in the indictment.

"Appellant was sentenced to four years on each Count of the indictment. The aggregate sentence was

eight years. The sentence on the conspiracy count is not challenged and we have held that there was no fatal variance between the proof and the allegations of the indictment in the fourth Count, and these Counts run consecutively. We therefore pretermit consideration of the other contentions of the insufficiency of the evidence."

REASONS FOR GRANTING THE WRIT.

1. Petitioner's Convictions Should Not Be Allowed to Stand Since They Are Based on Summary Charts or Exhibits Prepared and Introduced by a Special Agent of the Federal Bureau of Investigation (Not an Expert) Summarizing Selective Items from Conflicting Evidence, Information Not in Evidence at the Trial, Conclusions and Hearsay Data Taken from FBI Reports Not in Evidence at the Trial and Invading the Province of the Jury.

The opinion of the Court of Appeals in this case is in conflict with all previous decisions of the other Circuits which we have been able to find in that no court has previously allowed a non-expert witness or an expert witness on a subject not a part of his qualifications, to introduce charts with the following data and in following manner. Exhibits 63 through 68 were prepared and introduced by a Special Agent of the Federal Bureau of Investigation on the basis of purely hearsay information and, as outlined above in the Statement in specific detail, reflected selective items from conflicting evidence introduced at the trial, information not appearing in the record and not obtainable from the record of the trial and the evidence introduced therein, conclusions, and data put together for the purpose of resolving all questions of the trial which invaded the province of the jury. Such summaries, from an FBI Agent, were undoubtedly given much weight by the jury.

No effort was made to qualify the Agent as an expert and merely summarizing ordinary evidence introduced at a trial in the most favorable light possible for the government is not a proper subject for qualification of an expert.

In a case where expert testimony was used the Court of Appeals for the Third Circuit reversed convictions in *United States v. Ward et al.*, 169 F.2d 460, l.c. 462, and held as follows:

> "We subscribe to the defendants' contention and are of the opinion that they are entitled to a new trial.
>
> "Johnson did more than merely disregard the payroll records. He went further. In comparing the invoices and attached lists with the testimony adduced in court, he made use of other materials not in evidence, by means of which he first determined the 'reliability' of the witnesses. Sworn statements had been taken by the Federal Bureau of Investigation prior to the trial from many of A. C. employees, including those who appeared as witnesses. These statements were not part of the record of the case. Johnson sat throughout the trial with prepared cards on which had been summarized the previous statements, and as each witness testified his testimony was compared with the cards to ascertain his 'reliability'. Just how the differences were treated was not comprehensively explained, but 'in the event that the testimony of the witness differed' from the sworn statement which had been summarized on the cards, Johnson 'treated each case individually' and could not state 'in broad terms' his method. After having thus selected those witnesses whom he considered 'reliable', Johnson prepared a 'schedule' which constituted the foundation for his 'summarizing' testimony that for a given vessel A. C. had rendered invoices to Pioneer which were 'unsupported' both as to a specific number of men and an ascertained amount of money.

"(1) It is readily apparent that Johnson, in his attempt to strengthen the government's case, did more than 'summarize' the evidence. From materials and information extraneous to the record he confessedly determined the 'accuracy' of evidence already in the case, and 'eliminated' the 'inaccurate' evidence as well as the testimony of witnesses regarded by him as 'uncertain'. This, of course, was an erroneous method of proof. For while it can scarcely be gainsaid that voluminous records may be summarized, or that an expert may interpret and explain certain evidence in the case and on the basis of such evidence perform tasks beyond the training and experience of the layman juror, it is nevertheless axiomatic that the 'expert' may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility. Nor may expertness be the medium for injecting into the record material and information not a part of the expert's qualifications and otherwise inadmissible through his lips. Apropos is the statement we made in United States v. Michener, 3 Cir., 1945, 152 F.2d 880, 883: 'The admission into the evidence of the auditors' conclusions and opinions as distinguished from mere statements of fact summarizing what was observed by them in the records was erroneous. * * *' And it was in aggravation of the error for Johnson to base his determination of the value of the evidence in the case upon information which had been collected, and which could have been directly submitted to the jury for its appraisal."

See also: *United States* v. *Michener*, 152 F.2d 880, l.c. 883 (Third Circuit); *Cooper* v. *United States*, 9 F.2d 216 (Eighth Circuit); 135 A.L.R. 1141. In the *Michener* case, *supra*, the court held, l.c. 883:

"The admissions into the evidence of the auditor's conclusions and opinions as distinguished from mere statements of fact summarizing what was observed by them in the records was erroneous."

It is noted the decision in the *Michener* case was reversed and that in said case the testimony was from auditors regarding the detailed inspections of voluminous books and records and, if properly done, would have been proper testimony from expert witnesses. It is respectfully submitted that Exhibits 63 through 68 introduced at the trial of this matter were so prejudicial and erroneous and in conflict with time honored requirements in criminal cases as to require the prompt consideration of this Court.

2. The Opinion of the Court of Appeals Is in Conflict with All Other Circuits in Holding That the Jury, in Finding Petitioner Guilty of the Conspiracy Count of the Indictment, Presumptively, Viewing the Evidence in the Light Most Favorable to the Government, Found Him Guilty of All the Fourteen Overt Acts Charged Therein, Which Included the Transportation of All of the Cars Described in the Other Six Substantive Counts of the Indictment.

Another urgent and important reason for granting the requested writ in this case is the reasoning used by the Court of Appeals in getting around petitioner's contention there was a fatal variance between the allegations of the indictment in Counts II, IV and VII and the proof, and petitioner's further contention that the court erred in denying his motion for acquittal on Counts II, V, VI and VII, which were considered together. The court held that in considering the question of the sufficiency of the evidence it must review the evidence in a light most favorable to the Government. Although the overt acts in the conspiracy count of the indictment did not reflect serial numbers or positive descriptive data of the automobiles mentioned therein, the court held that the overt acts pertained to the transportation of the cars described in Counts II,

III, IV, V, VI and VII. The Court of Appeals then held, on page 5 of its opinion:

> "In this connection it should be borne in mind that the jury, in finding appellant guilty on Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V; VI and VII. Thus, overt act No. 1, charges that:
>
> > 'On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr., transported a stolen 1957 Chevrolet from Kansas City, Missouri, to Denver, Colorado.' "

It is thus noted that the Court of Appeals apparently used the theory that conviction of petitioner on the conspiracy count automatically took care of the burden of proof and any fatal variances regarding the other six counts of the indictment. In the first place, the overt acts did not contain adequate descriptive data and statements of intent to be considered as identical with substantive counts. The more dangerous and shocking part of the Court of Appeals decision is, however, the statement that the jury in finding petitioner guilty of the conspiracy count, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. The fact this theory is neither reasonable nor possible is best and most quickly illustrated by the fact the trial judge instructed the jury as follows (R. 417):

> "I might say before I read this list of overt acts that in a conspiracy count it is necessary to allege and prove at least one overt act in furtherance of the conspiracy, an act by one or more of the alleged conspirators."

Under the above instruction, how could it ever be said by anyone that finding petitioner guilty of the conspiracy

count found him guilty of *all* of the overt acts? It is respectfully submitted that allowing such a doctrine to stand will encourage the already existing desire on the part of Federal prosecutors to stick a conspiracy count into all of their indictments, with the resulting confusion and problems well illustrated by this case.

While it is most elementary law that in a conspiracy prosecution under a count containing many overt acts, to secure a conviction it is necessary to prove only one of the overt acts beyond a reasonable doubt, the following citations are respectfully submitted on this point: *United States* v. *Haug*, 21 F.R.D. 22, l.c. 17; *United States* v. *McGee*, 108 F. Supp. 909; *Short* v. *United States*, 91 F.2d 614, l.c. 618, C.C.A. 4th; *Jung Quey* v. *United States*, 222 Fed. 766 (C.C.A. 9th).

In view of the indictment in this case, the above specific instruction given by the trial court and the above citations, it is respectfully submitted that the opinion of the Court of Appeals is most erroneous; that it violates time honored requirements in all the other circuits; that it is on a subject of great importance to justice throughout the country and that petitioner's writ should be granted.

3. This Court Should Consider the Growing Practice in Federal Courts, As Illustrated by This Case, of Charging Defendants in the Same Indictment or Information with Violation of Conspiracy and Substantive Statutes Regarding the Same Alleged Crimes for the Obvious Purpose of Getting into Evidence Data Not Otherwise Admissible and Thereby Creating the Confusion and Problems Resulting Therefrom.

This case illustrates the unjust and unbelievable results occurring in United States District Courts which are allowing the Conspiracy statute to be used as an instrument

for getting into evidence all kinds of unrelated and confusing evidence of a prejudicial nature. not otherwise admissible, in the prosecution of cases under informations and indictments with both conspiracy and substantive counts arising out of the same subject matter. In this case there were six so-called substantive counts which were all included as overt acts in a conspiracy count, all tried together. The philosophy of "anything goes" which has resulted in allowing such procedures in Federal courts is undoubtedly responsible for the fact that in this case the court allowed a Special Agent of the Federal Bureau of Investigation to help straighten out the terrible confusion of the testimony from forty-nine witnesses and seventy-two exhibits by preparing and giving to the jury six so-called summary charts which resolved quickly and easily all of the problems the jury had to decide. As reflected in detail in the Statement above herein, these charts reflected selective items from conflicting evidence introduced at the trial; information not in evidence at the trial, conclusions, hearsay information taken from FBI reports not in evidence and argumentative data invading the province of the jury. In admitting these exhibits, the trial court said, as reflected on page 9 of the opinion of the Court of Appeals: "Certainly it is of value to the Court and jury in having the evidence pulled together in summary form. The objection overruled." In short, the Government is being allowed to pile up inferenee upon inference, suspicion upon suspicion, introduce all sorts of inadmissible evidence upon statements various data will be connected to show conspiracy activities—and is then allowed to furnish the jury with self-serving charts to help the jury out of its dilemma. Allowing the government ~~a defendant~~ to introduce testimoy of an "expert" witness to summarize the testimony of Government witnesses in chart form and on

such a basis usurps the province of the jury and offends against all sense of fairness and justice.

When defendants are convicted under this procedure although absolutely no evidence is introduced at the trial connecting them with the alleged crime, as petitioner's conviction of Count II herein, this does not appear to bother the courts or the Department of Justice. The fact that such a thing *can* happen in our Federal courts should, sooner or later, attract the attention of and call for action by this court. It is a terrible reflection on the procedures being allowed and followed in our Federal Courts. It is a problem which is of utmost importance throughout the Country and urgently needs consideration by this Court.

CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Walter A. Raymond

WALTER A. RAYMOND and
KENNETH C. WEST,
Counsel for Petitioner.